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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
PETITIONER,

vs.

CARL BYERLY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1939.

CERTIORARI GRANTED JANUARY 29, 1940.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record from D. C. U. S., Southern District of Ohio	1	1
Debtor's petition	1	1
Application for restraining order	3	3
Entry restraining foreclosure proceedings	4	4
Order modifying restraining order	4	4
Approval of petition and order of reference	5	5
Report of the conciliation commissioner	6	6
Debtor's amended petition	7	7
Adjudication of bankruptcy and order of reference	8	8
Order dismissing debtor's petition and amended petition	8	8
Application for reinstatement	9	9
Order granting reinstatement	11	11
Motion to dismiss application for reinstatement	11	11
Motion for order of disclaimer	12	11
Entry finding Subsection (s), Section 75 of the Bankruptcy Act constitutional	13	13
Opinion, Underwood, J.	14	13
Order of disclaimer	18	17
Petition for rehearing	20	20
Entry dissolving temporary restraining order	25	25

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—6175

	Original	Print
Record from D. C. U. S., Southern District of Ohio—Continued.		
Opinion, Underwood, J.	26	25
Motion to refer to conciliation commissioner	33	32
Opinion on motion to refer, Underwood, J.	33	33
Entry overruling petition for rehearing	34	34
Omission from motion to refer to conciliation commissioner	34-a	34
Motion to refer to conciliation commissioner	35	35
Entry overruling motion to refer to conciliation commissioner	35	35
Entry overruling motion to refer to conciliation commissioner	36	36
Petition for appeal	37	37
Order allowing appeal	38	38
Assignment of errors	39	38
Bond on appeal (omitted in printing)	40	
Citation and service (omitted in printing)	41	
Entry extending time, etc.	42	40
Precipe for record	43	40
Clerk's certificate (omitted in printing)	45	
Proceedings in U. S. C. C. A., Sixth Circuit	47	43
Minute entry of argument and submission	47	43
Judgment	47	43
Opinion, Hicks, J.	48	43
Clerk's certificate (omitted in printing)	53	
Order allowing certiorari	54	48

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 10984

In the Matter of Carl Byerly, Debtor

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT—Filed November 19, 1934

To the Honorable Benson W. Hough, Judge of the District Court of the United States, for the Southern District of Ohio, Eastern Division:

The petition of Carl Byerly, London, R. F. D. No. 3, Ohio, in the county of Madison, and district and state of Ohio, respectfully represent:

That he is personally bona fide engaged primarily in farming operations as follows: that he lives on his mother's farm, adjoining his farm and that he operates his farm himself and for his own use and benefit: that such farming operations, occur in the county of Madison, within the said judicial district: that he is insolvent: and that he desires to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act, and to receive the benefits under the Frazier-Lemke Act.

That the schedule hereto anexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

Carl Byerly.

[Duly verified.]

[fol. 2] SCHEDULE "A"

Taxes Due State and County

Scott Slaughter, treasurer of Madison county, London, Ohio. Real and personal taxes $631.83

Secured Creditors

Union Joint Stock Land Bank, Detroit, Michigan. Real estate mortgage in the sum of $10,500.00 more or less on which there is a balance due of more or less $12,800.00

Unsecured Creditors

West Jefferson Power and Light Co., West Jefferson, Ohio. Note $74.36

Total more or less $13,526.19

[Duly certified.]

Schedule "B"

Real Estate

70 acres in Monroe Tp., No. of entry 2881
30.66 acres in Monroe Tp., No. of entry 7791
19.49 acres in Monroe Tp., No. of entry 7791
12.50 acres in Canaan Tp., No. of entry 7791
50.79 acres in Canaan Tp., No. of entry 7791

183.44 acres in Madison county, Ohio $9,150.00

Incumbrances

Mortgage on the above real estate in the sum of $12,800.00 as described in Schedule "A" hereof.

Statement

Foreclosure proceedings have been brought by the Union Joint Stock Land Bank, Detroit, Michigan, in the Court of Common Pleas, Madison county, Ohio, being Case No. 16172, Union Joint Stock Land Bank v. Carl Byerly, et al., defendant.

Sale set for Saturday, the twenty-fourth day of November, 1934.

Chattels

Two horses, one cow, one heifer, seven yearling sows, one yearling male hog, seven gilts, five feeding hogs, 30 chickens	$320.00
Farmall tractor and corn, breaking plow and double disc: one binder, 3 corn plows, one corn planter, four wagons, 3 sets harness, and other tools	320.00
1,200 bu. corn in shock and crib, 150 bu. oats, 20 tons clover hay, 3 tons loose clover hay, 900 [fol. 3] shocks fodder, 3 bu. clover seed, 3 tons baled oat straw	1,065.00
Household goods	100.00
Total	$10,955.00

[Duly certified.]

IN UNITED STATES DISTRICT COURT

APPLICATION FOR RESTRAINING ORDER—Filed November 19, 1934

Now comes Carl Byerly of R. F. D. No. 3, London, Ohio, in the county of Madison, and says that on the —th day of November, he duly filed his petition in the United States District Court, Southern District of Ohio, Eastern Division, at Columbus, Ohio, under Section 75 of the Bankruptcy Act, praying that he may be given an extension of time to pay his debts under said section, and also to receive the benefits of the Frazier-Lemke Act, and whereas the Union Joint Stock Land Bank has foreclosed on the debtor and has obtained an order of sale for real property, said sale being ordered for November 24, 1934:

Your debtor, therefore, further represents that he is attempting to effect a composition of all creditors or to secure an extension of time on his debts, but that if the said foreclosure and sale continue as scheduled, that he will not be able to carry out plans as contemplated.

Wherefore, the debtor prays that an order of this court may issue restraining the Union Joint Stock Land Bank and the sheriff of Madison county and the Court of Common

Pleas, from proceeding further under said foreclosure and order of sale until the further order of this court.

Carl Byerly.

[Duly verified.]

[fol. 4] IN UNITED STATES DISTRICT COURT

ENTRY RESTRAINING FORECLOSURE PROCEEDINGS—Filed November 19, 1934

At Columbus, Ohio, in the said district on the — day of November, 1934, before the Honorable Benson W. Hough, judge of said court, application of Carl Byerly, praying for an order to stay the foreclosure and order of sale held by the Union Joint Stock Land Bank, and the sheriff of Madison county, being Case No. 16172 on the Common Pleas Docket of Madison county, Ohio, and the sheriff under said order from proceeding with the sale or taking any further action in connection with said proceedings by virtue of Section 75 of the Bankruptcy Act, having been duly heard and considered, it is ordered that the Union Joint Stock Land Bank and the sheriff of Madison county, be and are hereby restrained from proceeding with the sale of said property described in said petition, until the further orders of this court.

Witnesseth, the Honorable Benson W. Hough, judge of the said court, and the seal thereof, at Columbus, Ohio, in said district on the fourteenth day of November, 1934.

Approved:

Hough, Judge.

IN UNITED STATES DISTRICT COURT

ORDER MODIFYING RESTRAINING ORDER ISSUED NOVEMBER 19, 1934—Issued November 23, 1934

This cause coming on to be heard upon the oral application of the Union Joint Stock Land Bank of Detroit to modify the order entered herein under date of November 19, 1934, whereby the said applicant and the sheriff of Madison county, Ohio, were restrained from proceeding with the sale of the property described in the above named debtor's petition herein, and it appearing that applicant has already

been put to considerable expense in preparing for sale of the said premises and that debtor will not be prejudiced by permitting the said property to be sold providing confirmation be not had, the court finds said application well taken, and it is hereby

[fol. 5]

Ordered, adjudged and decreed, that the restraining order entered herein under date of November 19, 1934, be and the same is hereby modified to permit the Union Joint Stock Land Bank of Detroit and the sheriff of Madison county, Ohio, to proceed to and conduct the sale of said premises in the proceedings now pending before the Madison county Common Pleas Court,

And it is further ordered that any proceedings or acts subsequent to the sale of said premises, particularly confirmation thereof, or the transfer of any title or deed thereunder be and the same are hereby enjoined and stayed until the further order of this court, in accordance with the order of November 19, 1934, except as the same is herein modified.

Hough, Judge of the United States District Court, Southern District of Ohio.

In United States District Court

Approval of Petition and Order of Reference—Filed December 14, 1934

At Columbus, Ohio, in said district, on the fourteenth day of December, A. D. 1934, before the Honorable B. W. Hough, judge of said court, the petition of Carl Byerly praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

It is therefore ordered that said matter be referred to Silas G. Williams, one of the conciliation commissioners of this court, to take such further proceedings therein as are required by said section; and that the said Carl Byerly shall attend before said conciliation commissioner forthwith at London, Ohio and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this court relating to the proceedings under this section.

Hough, United States District Judge.

[fol. 6] IN UNITED STATES DISTRICT COURT

REPORT OF CONCILIATION COMMISSIONER—Filed February 11, 1935

January 8, 1935.

At London, in said district, upon this eighth day of January, A. D. 1935, before the undersigned conciliation commissioner for Madison county, Ohio, the first meeting of creditors in the above case was had, of which due notice was given to creditors, by mail, as required by law, and the undersigned sat at the time and place mentioned in said notice, to preside at the examination of the debtor, and for such further proceedings as may be taken according to law.

There was present and represented at said meeting creditors as follows:

Mr. Kitchen, field man for Joint Stock Land Bank, and representing the secured creditor, the Union Joint Stock Land Bank of Detroit, Michigan.

The unsecured creditor was not present at this meeting.

The debtor offered as a composition and settlement, to the secured creditor $9,000.00 cash.

The meeting then adjourned until——

A second meeting was had in the above case on January 24, 1935 at 10 o'clock a. m. at my office in London, Ohio.

Mr. Floyd S. Willett of the law firm of Masters, Crane & Willett, was present and represented the secured creditor, the Union Joint Stock Land Bank of Detroit, Michigan.

The unsecured creditor was not present at this meeting, and no claim was filed, therefore their claim was not allowed.

The claim of the Union Joint Stock Land Bank of Detroit, was filed and allowed as appears by the order of allowance herein.

The debtor resubmitted his offer of composition, previously submitted in first meeting.

The offer aforesaid was not accepted by the secured creditor, the Joint Stock Land Bank of Michigan.

Consequently, the acceptance filed did not constitute a majority in number and amount of all creditors whose claims were filed and allowed, and the offer was thereupon declared not accepted.

The meeting was thereupon declared adjourned.

Silas G. Williams, Conciliation Commissioner of Madison County, Ohio.

[fol. 7] IN UNITED STATES DISTRICT COURT

DEBTOR'S AMENDED PETITION—Filed February 11, 1935

To the Honorable Benson W. Hough, Judge of the District Court of the United States for the Southern District of Ohio, Eastern Division:

In the petition of Carl Byerly of London, R. F. D. 3, Ohio, in the county of Madison, and district and state of Ohio, respectfully represents:

(1) That on November 19, 1934, the debtor duly filed in said court a petition under Section 75 of the Bankruptcy Act of 1898 as amended, the said section entitled "Agricultural Compositions and Extensions."

(2) That on February 11, 1935, the conciliation commissioner, to whom the original petition was referred, filed his report in this case to the effect that the debtor failed to obtain the acceptance of a majority in number and amount of all the creditors whose claims were effected by the composition or extension plan that was proposed.

(3) That the debtor asks relief of this honorable court to amend his petition as provided in sub-section "s" of Section 75 of the Bankruptcy Act of 1898 as amended, so that he may obtain the protection and the benefits of the said sub-section "s".

(4) He, therefore, asks to be adjudged a bankrupt as provided under said sub-section "s", Section 75.

(5) He petitions the court that all his property be appraised and that his exemptions as prescribed by state law, subject to any liens thereon, be set aside and that he be allowed to retain possession of any part or parcel of all remaining of his property and pay for the same under the terms and conditions set forth in said sub-section "s".

Wherefore, the debtor prays that the petition under said Section 75 filed on November 19, 1934, be amended to provide for this additional relief and also for such other and further relief as this honorable court may deem just and proper.

Carl Byerly, Debtor.

[Duly verified.]

[fol. 8] IN UNITED STATES DISTRICT COURT

ADJUDICATION OF BANKRUPTCY AND ORDER OF REFERENCE—Filed February 11, 1935

At Columbus, in said district, on the eleventh day of February, A. D. 1935, before the Honorable B. W. Hough, judge of said Court in Bankruptcy, the amended petition of Carl Byerly that he be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard, and duly considered, the said Carl Byerly is hereby declared and adjudged a bankrupt accordingly.

It is therefore ordered, that upon the amended petition filed in this court by or against said bankrupt on the eleventh day of February, A. D. 1935, said matter be referred to J. A. White, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said Carl Byerly shall attend before said referee on the —— day of forthwith, at Columbus, Ohio and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

Witness the Honorable B. W. Hough, judge of said court, and the seal thereof, at Columbus, Ohio, in said district, on the eleventh day of February, A. D. 1935.

H. F. Rabe, Clerk. By Wm. Robinett, Jr., Deputy Clerk.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITIONS—Filed August 26, 1935

This day this matter came on to be heard upon the application of the debtor herein for an order dismissing this proceedings, and it appearing to the court that the debtor heretofore filed his petition under Section 75 of the Bankruptcy Act as amended, praying for composition or extension; that upon said petition reference was duly had to and a meeting of creditors was held before Silas G. Williams [fol. 9] conciliation commissioner for Madison county, Ohio, and that debtor's offer of composition or extension was refused by a majority of creditors, both in number and amount, that the said commissioner has filed his return

showing such refusal and that thereafter the debtor amended his petition herein, and proceeded under Subsection s of Section 75 of said Bankruptcy Act, and that the said sub-section was found to be unconstitutional by the United States Supreme Court,

It is therefore ordered that the debtor's petition and amended petition be and the same are hereby dismissed and that this matter be and the same is hereby fully terminated.

Hough, United States District Judge.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR REINSTATEMENT—Filed September 24, 1935

Now comes Carl Byerly the above named farmer debtor and says that his case Number 10984 was pending in this court pursuant to Section 75 of the Bankruptcy Act and that by the provisions of said act the sale of his real estate which is fully described in the schedules which accompanied his petition, which sale was about to be held by the sheriff of Madison county, Ohio, in a foreclosure case pending in the Common Pleas Court of said county, was stayed; also that this court issued an injunction restraining the sheriff of said county and the Union Joint Stock Land Bank of Detroit from proceeding further with said sale; that subsequent to the issuance of said injunction the said Union Joint Stock Land Bank of Detroit represented to him, the said Carl Byerly, while his said case was still so pending in this court that unless he the said Carl Byerly would dismiss his proceeding in this court, that is his farmer debtor proceeding in this case Number 10984, it the Union Joint Stock Land Bank of Detroit would [fol. 10] foreclose his mortgage in said Common Pleas Court case pending in Madison county, Ohio, in which said land bank was the mortgagee plaintiff; that he the said Carl Byerly relying upon the said representations of the said land bank and believing that the only way by which the foreclosure of the said land bank's mortgage could be prevented was to have said case Number 10984 in this court dismissed consented that it might be so dismissed whereupon his attorney of record in this case Number 10984 filed a motion therein and obtained an order dismissing the

same; that thereupon the said the Union Joint Stock Land Bank of Detroit contrary to the statements and representations made to the said Carl Byerly proceeded to obtain the consummation of the said sheriff sale of said real estate to it, the said the Union Joint Stock Land Bank of Detroit, accepted the delivery of a deed from said sheriff to it and recorded said deed in the office of the recorder of Madison county, Ohio; the first knowledge of the said sale came to this applicant, Carl Byerly, this week, whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court it was the dismissal thereof which allowed said sale to be consummated.

The applicant, Carl Byerly, further says that he desires the reinstatement of his said case 10984 in order that he may have the advantage of Section 75 of the Bankruptcy Act as amended August 28, 1935. He further says that he has reason to believe and does believe and therefore avers that unless said Joint Stock Land Bank of Detroit is restrained from doing so it will attempt to sell said real estate, or sell the same, or enter into some contract to sell or encumber the same, or encumber the same, or in some other manner make the recovery of said real estate by this applicant, and the application of the provisions of said Section 75 of the Bankruptcy Act to him and to said real estate as to him, impossible.

Wherefore this applicant, Carl Byerly, prays that his said proceeding in case 10984 in this court be reinstated as of the date of its said dismissal, that he may be allowed to invoke the provisions and benefits of said Section 75 as so amended, and that the said the Joint Stock Land Bank of Detroit be restrained from in any manner disposing of, deeding, mortgaging, encumbering, or contract-
[fol. 11] ing to so do, until the further order of this court.

Carl Byerly. Elmer McClain, Lima, Ohio, Attorney for Said Carl Byerly.

[Duly verified.]

In United States District Court

Order Granting Reinstatement—Entered September 24, 1935

To Clerk:

File application and reinstate case.

Set for hearing October 11, 1935 on motion to dismiss raising questions of validity of new amendment passed and effective August 28, 1935.

Hough, Judge.

In United States District Court

Motion to Dismiss Application for Reinstatement—Filed November 14, 1935

And now comes Union Joint Stock Land Bank of Detroit, against whom the debtor seeks relief under his application for reinstatement and moves the court to dismiss the said application:

First: That subsection (s) of Section 75 of the Bankruptcy Act, otherwise known as Subsection (s) of Section 203, Chapter 8, Title II of the U. S. Code, upon which the application for relief is predicated is unconstitutional.

[fol. 12] Second: That subsection (s) of Section 75 of the Bankruptcy Act does not extend or apply to property, the title to which had passed out of the debtor by deed, delivered and recorded prior to the date of the filing of the application for reinstatement.

Third: That subsection (s) of Section 75 can only extend and apply to property and property rights of debtor possessed and held by him at the date and time of the filing of the application for reinstatement.

Union Joint Stock Land Bank of Detroit, by J. E. Fouser, Vice-President.

In United States District Court

Motion for Order of Disclaimer—Filed May 8, 1936

Comes now Union Joint Stock Land Bank of Detroit, and respectfully moves the court for an order of disclaimer

under the above estate and in favor of Union Stock Land Bank of Detroit with respect to property described as follows:

(A description of the real estate is printed as part of the petition at page 2.)

Showing in support of said motion as follows:

1. That this cause is a reinstated proceeding under Section 75 of the Bankruptcy Act as amended. That following the decision of the United States Supreme Court, in the Radford case, the original proceeding in this cause was dismissed by the consent of the debtor bankrupt. That on September 10, 1935, Union Joint Stock Land Bank of Detroit applied for and secured a confirmation of a foreclosure sale of the property involved, held November 24, 1934, at which sale the bank was the purchaser and incident to which the purchase price, all taxes and costs were paid. That simultaneously therewith sheriff's deed issued to the bank and was then filed for record on September 11, 1935, at 8:17 o'clock a. m. and recorded in Volume 116, page 423, of the Madison county, Ohio, records.

[fol. 13] 2. That application for reinstatement of this cause under Section 75 of the Bankruptcy Act as amended August 28, 1935, was sworn to by the debtor on September 21, 1935, and was necessarily filed on or later than that date.

3. That at no time during the original proceeding or the reinstated proceeding did debtor bankrupt make any report in respect to his activities on the property involved nor did he make any accounting of the benefits and revenue derived therefrom; that at no time was there any administration or supervision over said debtor bankrupt or the property involved; that at no time did said debtor bankrupt give any attention to or make any payment toward the reduction of the obligation owing the bank.

4. That Section 75 of the Bankruptcy Act as amended August 28, 1935, is unconstitutional.

Masters, Crane & Willett, Attorneys for Union Joint Stock Land Bank of Detroit, By John W. Neville, Ralph G. Martin.

In United States District Court

Entry Finding Subsection (s), Section 75 of the Bankruptcy Act to be Constitutional—Filed May 21, 1936

The application of the farmer debtor for reinstatement of this case having been granted by an order signed by Judge Hough on September 21, 1935, and filed on September 23, 1935, which order reads as follows:

"To Clerk: File application and reinstate case. Set for hearing October 11, 1935 on motion to dismiss raising questions of validity of new amendment passed —— —, ——, and effective August 28, 1935.

Hough, Judge."

and Judge Hough having on October 11, 1935, ordered [fol. 14] briefs to be filed and arguments to be presented upon the question of the constitutionality of the said act approved August 28, 1935, being subsection (s) of Section 75 of the Bankruptcy Act, and briefs having been filed and arguments presented orally to Judge Robert R. Nevin of this court on December 3, 1935, subsequent to the death of Judge Hough, and the same having been considered, therefore

The court finds and concludes that subsection (s) of Section 75 of the Bankruptcy Act, as amended August 28, 1935, is constitutional. Exceptions to Union Joint Stock Land Bank of Detroit.

Approved:

Robert R. Nevin, District Judge. Elmer McClain, Attorney for Carl Byerly, Farmer-Debtor.

In United States District Court

Opinion—Filed October 14, 1936

Underwood, District Judge:

This is a proceeding under Section 75 of the Bankruptcy Act. On March 1, 1924, Carl Byerly, debtor herein, executed and delivered to the Ohio-Pennsylvania Joint Stock Land Bank of Cleveland, a certain note and mortgage in the sum of $12,000 as security for a loan of the same

amount. The note and mortgage were subsequently assigned to the Union Joint Stock Land Bank of Detroit.

The loan became delinquent September 1, 1932 and foreclosure proceedings were instituted by the Union Joint Stock Land Bank of Detroit in the Common Pleas Court of Madison county, Ohio. Judgment was rendered against the debtor in favor of the bank and the property was advertised for sale. Just prior to the sale, the debtor filed his petition in this court under Section 75 of the Bankruptcy Act. A restraining order issued out of this court direct-
[fol. 15] ing the bank and the sheriff of Madison county to proceed no further with the sale until further order of the court.

Subsequently, upon motion of the bank, the restraining order was modified to permit the bank and the sheriff of Madison county to proceed with the sale of the premises, but enjoining and staying the confirmation of said sale or the transfer of any title or deed thereunder. The sale was held under the modified order and the bank became the purchaser.

The cause pending in this court having been referred to a conciliation commissioner, creditors' meetings were held but the debtor's offer of composition was rejected. This fact was duly reported to the court by the commissioner, February 11, 1935. Whereupon the debtor petitioned for leave to amend his petition and proceed under Subsection (s) of Section 75. Leave was granted and adjudication was entered February 11, 1935.

Following the decision of the Supreme Court in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, holding Subsection (s) unconstitutional, the instant case came on for hearing in this court upon application of the debtor to have his petition and amended petition disinissed upon the ground that his offer of composition had been rejected and that the subsection under which his proceedings were then pending, had been held to be unconstitutional. An order dismissing the proceedings was entered by the court August 26, 1935, with the approval of debtor's counsel. The bank then secured confirmation of the sheriff's sale; a deed was executed and delivered by the sheriff and it was recorded September 11, 1935, in the records of Madison county.

The act having been amended and a new Subsection (s) enacted, the debtor filed his application herein for reinstate-

ment, September 24, 1935. In his application the debtor alleges that he had been informed by the bank that unless his proceedings in this court were dismissed, the bank would complete its foreclosure proceedings in the state court; that he asked dismissal solely for this reason, thinking it the only way to save his farm. The debtor further alleges that upon changing counsel, he found that the dismissal requested upon advice of his first counsel, was the circumstance which made consummation of the sale possible. A motion was filed by the bank to dismiss said application for reinstatement upon three grounds; that the new Subsection (s) is unconstitutional; that it could not apply in this case since title had passed prior to the application [fol. 16] for reinstatement; and that it could have no application to this case, since the debtor did not possess and hold the property in question at the time of filing his application for reinstatement.

The application for reinstatement was set for hearing October 11, 1935, by my predecessor Judge Hough, "on motion to dismiss, raising question of validity of new amendment passed," together with several similar cases. Subsequent to the death of Judge Hough, Judge Nevin found the act as amended constitutional, and an entry to that effect was made May 21, 1936. It is considered that reinstatement became effective at that time.

The bank filed its motion for an order of disclaimer in its favor of the mortgaged premises purchased by it in the foreclosure proceeding conducted in the state court. The cause is now pending before this court on said motion, which was argued to the court June 19, 1936.

Coming now to the questions involved at the present time, it is apparent that during the pendency of the original action here and the term of the restraining order, all further proceedings in the state court were held in abeyance; title could not pass, the sale could not be confirmed, and deeds could not be delivered. This was the situation existing up to the time of the decision in the Radford case. If the effect of the Radford decision was to void the entire proceeding here, and the restraining order theretofore issued (and the court does not so hold), then the jurisdiction of this court was ended and representations made by the bank or others could not alter that fact. If, however, the restraining order was still in effect under remaining

provisions of Section 75, then the bank could not proceed until the order had been terminated. This was accomplished by the order of dismissal entered August 26, 1935 at the request of the debtor. Hence it becomes apparent that no matter what reasoning is applied, the jurisdiction of this court in the matter ended as of August 26, at the latest.

In arriving at this conclusion, it is immaterial whether the debtor acted upon misapprehension either of law or of fact; whatever his intent, his motive, or his purpose, the granting of his motion effectively concluded the remaining jurisdiction of this court in the case and clearly voided the restraining order.

Therefore, when the sale was consummated in the state court on September 10, 1935, nothing was pending here; this court being at the time entirely without jurisdiction, the state court was free to act and insofar as this proceeding is concerned the title passing to the bank was valid. [fol. 17] Upon reinstatement here, the debtor may have placed himself within the jurisdiction of this court, but he was powerless to bring property formerly owned by him within the jurisdiction of the court after the sale had been confirmed and title had passed.

Attention may be directed to a long line of decisions holding Bankruptcy Courts to be without jurisdiction after title has passed, the sale confirmed and deeds delivered. Among these may be cited: In Re: Knauft (D. C. So. Dist. Cal.) 10 F. Supp., 785; Compton v. Birnie Trust Company, et al. (C. C. A. 4), 76 F., (2d), 639; In Re: Borgelt (D. C. So. Dist. Ill.), 10 F. Supp., 113; Glenn v. Hollums and Glenn v. Eaves (C. C. A. 5), 80 F. (2d), 555; In Re: Randall (D. C. West. Dist. Pa.); In Re Thisler (D. C., Kans.); In Re Chaboya (D. C., So. Dist. Cal.), 9 F. Supp., 174; and In Re Coller (D. C., N. Y.), 8 F. Supp., 447.

Recent cases have applied the same reasoning in instances where jurisdiction of the Bankruptcy Court has been terminated and reinstatement is sought after foreclosure under Section 75 as amended. In the case of Du Bose v. Carolinas Land Bank, 31 A. B. R. (N. S.), 17, the Circuit Court of Appeals for the Fourth District, held that Section 75 (s) as amended was not retroactive and the court was without jurisdiction where foreclosure and sale had been completed after dismissal under old Section 75 (s)

but prior to passage of new Section 75 (s) and reinstatement thereunder. The District Court for the Western District of New York in the case of In Re Weise, 12 Fed. Supp., 871, held that after foreclosure sale the debtor was not entitled to the reopening of Section 75 (s) proceeding in order to take advantage of the amendment. In Re Ledwidge (D. C., W. Dist. Mo.), decided November 1, 1935, held that proceedings brought under the Frazier-Lempke Act will not be reinstated where there has been a final order of dismissal upon which the secured creditor has acted.

In view of the cases cited and the circumstances of this particular case, the court is compelled to hold that irrespective of the motives or purposes which led the debtor to move for the dismissal of his proceedings herein, the cause passed from the jurisdiction of this court with the entry of dismissal on August 26, 1935; that so far as this proceeding is concerned, a good title was conveyed to the bank during the interval when this court had no jurisdiction; and that reinstatement in this court under the circumstances, did [fol. 18] not and could not, bring the property to which title has passed within its jurisdiction. A decision otherwise, in the opinion of the court, would require a finding here that the title remains in the debtor, despite the decision of the state court. This the court is unable to do in what must be deemed in this proceeding, to be a collateral attack on the title passed in the state court.

It is the decision of the court, therefore, that it is without jurisdiction of the property in question and that the motion of the Union Joint Stock Land Bank for an order of disclaimer is well taken; that it ought to be, and the same hereby is, granted. An order of disclaimer in favor of the bank will issue. Entry accordingly.

Mell G. Underwood, Judge.

IN UNITED STATES DISTRICT COURT

ORDER OF DISCLAIMER—Filed October 22, 1936

This day this matter came on to be heard by the court upon the motion of the Union Joint Stock Land Bank of Detroit for an order of disclaimer herein in favor of the

Union Joint Stock Land Bank of Detroit with respect to property described as follows:

(A description of the real estate is printed as a part of the petition at page 2.)

Said motion was heard by the court together with argument of counsel thereon and the court being fully advised in the premises finds that this is a proceeding under Section 75 of the Bankrupt[illegible] Act; that on March 1, 1924, Carl Byerly, debtor herein, executed and delivered to the Ohio-Pennsylvania Joint Stock Land Bank of Cleveland, a certain note and mortgage in the amount of $12,000.00 as security for a loan of the same amount; that said note and mortgage were subsequently assigned to the Union Joint Stock Land Bank of Detroit.

The court further finds that said loans became delinquent September 1, 1932 and foreclosure proceedings were insti- [fol. 19] tuted by the Union Joint Stock Land Bank of Detroit in the Common Pleas Court of Madison county, Ohio; that judgment was rendered against the debtor in favor of the bank and the property advertised for sale; that just prior to the sale, the debtor filed his petition in this court under Section 75 of the Bankruptcy Act and a restraining order issued out of this court directing the bank and the sheriff of Madison county to proceed no further with the sale until further order of the court; that subsequently upon motion of the bank, the restraining order was modified to permit the bank and the sheriff of Madison county to proceed with the sale of the premises, but enjoining and staying the confirmation of said sale or the transfer of any title or deed thereunder; that the sale was held under the modified order and the bank became the purchaser.

The court further finds that the cause pending in this court having been referred to a conciliation commissioner, creditors' meetings were held but the debtor's offer of composition was rejected; that this fact was duly reported to the court by the commissioner, February 11, 1935. Whereupon the debtor petitioned for leave to amend his petition and proceed under Subsection (s) of Section 75, and leave was granted and adjudication entered February 11, 1936.

The court further finds that following the decision of the Supreme Court of the United States in Louisville Joint Stock Land Bank v. Radford, 295 U. S., 555, holding Subsection (s) unconstitutional, the instant case came on for

hearing in this court upon application of the debtor to have his petition and amended petition dismissed upon the ground that his offer of composition had been rejected and that the subsection under which his proceedings were then pending, had been held to be unconstitutional; that an order dismissing the proceedings was entered by this court August 26, 1935, with the approval of the debtor's counsel; that the bank then secured confirmation of the sheriff's sale; a deed was executed and delivered by the sheriff covering the real estate hereinbefore described, and it was recorded September 11, 1935 in the recorder's office of Madison county, Ohio.

The court further finds that the act having been amended and a new Subsection (s) enacted, the debtor filed his application herein for reinstatement September 24, 1935 and said cause was thereafter reinstated by this court.

The court further finds that when the sale of the above [fol. 20] described real estate was consummated in the Court of Common Pleas, Madison county on September 10, 1935, no proceeding was pending in this court and this court at said time was entirely without jurisdiction in regard to said real estate; that the reinstatement of this proceeding did not give this court further jurisdiction over said real estate; that this cause passed from the jurisdiction of this court with the entry of dismissal on August 26, 1935; that so far as this proceeding is concerned a good title was conveyed to the Union Joint Stock Land Bank of Detroit during the interval when this court had no jurisdiction and that reinstatement in this court under the circumstances did not and could not bring the property to which title had passed, within its jurisdiction.

It is therefore ordered, adjudged and decreed that the motion of the Union Joint Stock Land Bank of Detroit for an order of disclaimer by this court of all right, title and interest in and to the real estate hereinbefore described be and the same is hereby sustained and it is further ordered, that all right, title and interest of the debtor, Carl Byerly and of this court in and to the real estate hereinbefore described be and the same is hereby disclaimed in favor of the Union Joint Stock Land Bank of Detroit.

To all of which findings and order, the debtor herein excepts.

Mell G. Underwood, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING—Filed October 26, 1936.

To the Honorable Mell G. Underwood, Judge of said Court:

The petition of Carl Byerly, farmer debtor bankrupt herein, respectfully shows:

1. That on May 8, 1936, the Union Joint Stock Land Bank of Detroit, one of the secured creditors herein, filed its motion for an order of disclaimer in its favor with respect [fol. 21] to the real estate of the debtor, described in said motion, consisting of 183.44 acres more or less.

2. That said motion was heard on June 19, 1936.

3. That on October 22, 1936, an "Order of Disclaimer" was approved by this court and filed in the office of the clerk thereof.

4. That the said Carl Byerly, farmer debtor bankrupt, moves for a rehearing of said motion upon the following grounds:

1. That there was on the date of the filing of said motion in this court, then pending and there still is pending, a motion in the Common Pleas Court of Madison county, Ohio, praying that the confirmation, order for deed, and the deed of the sheriff of said county to the said Union Joint Stock Land Bank of Detroit be set aside and be held for naught. That said motion was filed in the said Common Pleas Court of Madison county, Ohio, on the twenty-third day of September, 1935, and set for hearing at 10:00 a. m. on October 19, 1935. That prior to the date set for said hearing on said motion in the Common Pleas Court of Madison county, Ohio, the said Union Joint Stock Land Bank of Detroit applied to the judge of said Common Pleas Court and requested that the hearing of said motion be deferred until after the constitutionality of Subsection (s) of Section 75 of the Bankruptcy Act, passed August 28, 1935, should be finally determined by the courts of the United States. That said application of the said Union Joint Stock Land Bank of Detroit was granted and said motion remains pending and unheard to this day.

2. That the said "Order of Disclaimer" issued by this court is based upon a misapprehension of the facts. The

decision of the court bases the right to have such an order of disclaimer upon the ground that the farmer debtor bankrupt had approved the dismissal of his farmer debtor proceedings before the enactment of the present Subsection (s) of Section 75 of the Bankruptcy Act. Whereas paragraph (5) of Section 6 of said act of August 28, 1935, provides that "* * * all cases that have been dismissed by any * * * court because of the Supreme Court's decision holding the former Subsection (s) unconstitutional, shall be promptly reinstated * * *". That the said order dismissing the proceedings which had been pending under the original Subsection (s) of Section 75 stated "* * * and that thereafter the debtor amended his petition herein and proceedings under Subsection (s) of Section 75 of said [fol. 22] Bankruptcy Act and that the said subsection was found to be unconstitutional by the United States Supreme Court, it is therefore ordered that the debtor's petition and amended petition be and the same are hereby dismissed and that this matter and the same is hereby fully terminated." That said order clearly shows that said dismissal was solely predicated upon the decision of the United States Supreme Court holding said original Subsection (s) to be unconstitutional, and that clearly by the terms of the present Subsection (s) set forth above the farmer debtor bankrupt's proceedings herein were entitled to be reinstated regardless of such order of dismissal.

3. That the fact that said farmer debtor bankrupt assented to the formal approval of said entry by his counsel could not in any way deprive him of the benefits of the present Subsection (s) according to the terms thereof. That such assent so given by the farmer debtor bankrupt to his counsel was based upon misrepresentation to him by certain representatives of the Union Joint Stock Land Bank of Detroit whereby it was stated to him that if he did not consent to such approval of said entry by his counsel, his farm would be lost to him by foreclosure in the Common Pleas Court, but that if he would give such assent the farm would be saved from foreclosure, and that he gave such assent to said order of dismissal for the purpose of saving his said farm from foreclosure and for no other reason.

4. That in addition to all of the foregoing the said farmer debtor bankrupt, after his motion for reinstatement in this court had been allowed by Judge Hough, who was then the

judge presiding in this court on the date of the allowance of said motion, to wit, on August 28, 1935, said farmer debtor bankrupt discovered what he did not then know, namely, that there had been an understanding and agreement between the counsel for said Union Joint Stock Land Bank of Detroit and counsel for said debtor bankrupt that, even though said order of disclaimer should be approved and filed in this court, the Union Joint Stock Land Bank of Detroit would not seek or obtain a confirmation of the sheriff's sale to the said Union Joint Stock Land Bank of Detroit, and order for deed to be executed and delivered to it by the sheriff of Madison county, Ohio, in which county said foreclosure proceedings were then pending.

5. That when the farmer debtor bankrupt's petition under Section 75, Subsections (a) to (r) of the Bankruptcy Act, was originally filed in this court Judge Hough, who was [fol. 23] then the judge of this court, issued an injunction restraining the sale of said real estate in said foreclosure proceedings which were then pending in Madison county, Ohio, and thereafter, contrary to the provisions of said Section 75, Subsections (a) to (r), an order was issued purporting to permit the sheriff to proceed with said sale but continuing the prohibition against the confirmation of any sale that might be held and the execution and delivery of any deed based thereon. Whereas, Sub ection (o) of said Section 75 provides that:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be * * * maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court: * * *

(2) Proceedings for foreclosure of a mortgage on land * * *

(5) Proceedings to sell land under or in satisfaction of any judgment * * *"

On October 17, 1936, the original of a proposed "Order of Disclaimer" was presented to counsel for the farmer debtor bankrupt by counsel for the said Union Joint Stock

Land Bank of Detroit with the statement that if it should not be approved within "one week" a copy of said order would be entered with the court. That before the expiration of said "one week," to wit, on October 20, 1936, counsel for said farmer debtor bankrupt, together with counsel for said Union Joint Stock Land Bank of Detroit presented themselves at the office of the judge of this court and said counsel for the farmer debtor bankrupt requested of Mr. Robert Newlon, law clerk or assistant to the judge of this court, an opportunity to present objections to the form of said proposed "order of Disclaimer" to the judge of this court but was refused an opportunity so to confer with the judge of this court upon the ground that probably satisfactory arrangements could be arrived at by conferring with said Robert Newlon. That counsel for the farmer debtor bankrupt explained to said Robert Newlon and to counsel for said bank that in the event the confirmation of said sheriff's deed should be set aside by the Common Pleas Court of Madison county, the wording of said proposed "Order of [fol. 24] Disclaimer" would allow it to be interpreted to mean that said real estate could not be reinstated in the proceedings pending in this court and that the jurisdiction of this court had been finally disclaimed and could not be reasserted. That counsel for the farmer debtor bankrupt herein proposed that the following words should be added at the end of the first paragraph on page 4 of said proposed "Order of Disclaimer" after the word "Detroit," and changing the period to a comma: "Provided that if the state of Ohio shall determine that said sheriff's deed is void and sets the same aside the said real estate shall revert to the jurisdiction of this court in these proceedings." That it was stated by counsel for said bank and by said Robert Newlon that the order as originally presented meant the same without as with the addition of said proviso just set forth herein. That said counsel for said bank requested opportunity to communicate with his associate counsel in Detroit. Whereupon he notified counsel for the farmer debtor bankrupt that said co-counsel would not assent to the addition of said proviso but that he, the counsel for the said bank who had so conferred with said Robert Newlon, had no objection to said proviso going in if the court should include it, and thereupon counsel for the farmer debtor bankrupt left with the said Robert Newlon the said original pro-

pbsed "Order of Disclaimer" which, until said time he, the counsel for the farmer debtor bankrupt, had retained in his possession with the understanding that if the judge of the court should assent to the inclusion of said proviso in said proposed "Order of Disclaimer," the same should be inserted, but if not, the said "Order of Disclaimer" should be returned to the counsel for the farmer debtor bankrupt and he then would be afforded opportunity to confer personally with the judge of this court in the presence of counsel for said bank and that the time within which said entry might be considered by counsel before entry thereof should be properly extended beyond the "one week" referred to above.

Counsel for the farmer debtor bankrupt stated to said Robert Newlon and to counsel for said bank that he feared that other counsel might have a different understanding of said proposed "Order of Disclaimer" and would insist upon a different interpretation thereof, which might cause serious loss to the farmer debtor bankrupt herein. That on October 21, one day before said "Order of Disclaimer" was filed in this court as above stated, certain counsel for said bank, [fol. 25] who was a different individu. . from the counsel hereinbefore referred to who was present at the conference with said Robert Newlon, represented to the sheriff, and possibly to other officials of Madison county, Ohio, that "the federal court had thrown Byerly's case out of court" and also obtained the services of the sheriff of Madison county, Ohio, to go out to the farm of the farmer debtor bankrupt and there order his hired workmen to quit work. That said acts were done notwithstanding the fact that the farmer debtor bankrupt's motion to have said order of confirmation set aside and vacated by the Common Pleas Court of Madison county, Ohio, was then pending and had not yet been heard.

Wherefore the petitioner prays that the court will grant a rehearing of said motion and allow the objections thereto on his behalf to be presented to this court.

Elmer McClain, Attorney for Carl Byerly, Farmer Debtor Bankrupt.

[Duly verified.]

IN UNITED STATES DISTRICT COURT

ENTRY DISSOLVING TEMPORARY RESTRAINING ORDER—Filed November 6, 1936

This day this cause came on to be heard upon the motion of the defendant, Carl Byerly, for an order of this court to vacate the decree of confirmation of the sale and order for deed heretofore made in this case, and upon which motion a temporary restraining order was granted; said motion was submitted on affidavits, oral testimony and arguments of counsel, and the court on consideration thereof, and being fully advised in the premises, finds that said motion is not well taken and the same is overruled and the temporary restraining order dissolved.

To which finding and order the defendant, Carl Byerly, excepts.

Approved: James F. Bell, Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

OPINION—Filed April 16, 1937

UNDERWOOD, District Judge:

This is a proceeding under Section 75 of the Bankruptcy Act, as amended. Carl Byerly was the owner of a certain farm which had been mortgaged to the Ohio-Pennsylvania Joint Stock Land Bank of Cleveland. Upon the default of said mortgagor under the terms of the mortgage, a suit in foreclosure was filed by the bank in Common Pleas Court of Madison county, Ohio, September 1, 1932. Judgment was rendered against the mortgagor in favor of the bank and the farm was advertised for sale under order of the state court.

Just prior to the sale, Byerly filed his petition in this court under Section 75 of the Bankruptcy Act, as amended. A restraining order issued out of this court directing the sheriff of Madison county to proceed no further with the sale until further order of the court.

Upon application of the bank, and before any hearing had been held by the conciliation commissioner or any report had been made by the commissioner, my predecessor, Judge Hough, granted a modification of the restraining

order permitting the sheriff to proceed with the sale, but specifically prohibiting confirmation, delivery of deed, or passage of title. The sale was held under the order as modified and said farm was purchased by the bank, further proceedings being stayed in accordance with the terms of said order.

The case was then referred to a conciliation commissioner, creditors' meetings were held and the debtor's offer of composition was rejected. This fact the commissioner reported to the court February 11, 1935. On the same day, the petitioner, by leave of court, amended his petition under Subsection (s) and was adjudicated a bankrupt. At this stage of the proceedings, the Supreme Court of the United States held Subsection (s) unconstitutional in the Radford case, 295 U. S., 555. Whereupon the debtor applied to this court asking that his petition and amended petition be dismissed upon the ground that his offer of composition had been rejected and that the subsection under which his proceedings was then pending had been declared unconstitutional. An order dismissing the proceedings was entered by the court August 26, 1935, with the approval of debtor's counsel. The bank then secured confirmation of the sheriff's sale; a deed was executed and delivered by the sheriff and it was recorded September 11, 1935 in the records of Madison county.

After the act was amended and a new Subsection (s) added, [fol. 27] the debtor filed his application herein for reinstatement, September 24, 1935. In his application the debtor alleged that he had been informed by the bank that unless his proceedings in this court were dismissed, the bank would complete its foreclosure proceedings in the state court; that he asked dismissal solely for this reason, thinking it the only way to save his farm. The debtor further alleged that upon changing counsel, he found that the dismissal requested upon advice of his first counsel, was the circumstance which made the confirmation of the sale possible. A motion was filed by the bank to dismiss said application for reinstatement upon three grounds: that the new Subsection (s) was unconstitutional; that it could not apply, since title had passed prior to the application for reinstatement, and that it could have no application, since the debtor did not possess and hold the property in question at the time of filing his application.

Said application for reinstatement was set for hearing October 11, 1935, by my predecessor, Judge Hough, "on motion to dismiss, raising question of validity of new amendment passed," together with several similar cases. Subsequently Judge Hough died and Judge Nevin found the act as amended constitutional, and an entry to that effect was made May 21, 1936. It is considered that reinstatement became fully effective at that time, although, if it be considered that reinstatement became effective on September 23, 1935, as contended by the debtor, the position of the debtor is not changed inasmuch as reinstatement took place after confirmation of the deed and after delivery and record.

The bank filed its motion for an order of disclaimer in its favor of the mortgaged premises purchased by it in the foreclosure proceedings conducted in the state court. The motion for an order of disclaimer was granted by this court, October 9, 1936. The debtor filed his petition herein, October 26, 1936 praying for a rehearing upon the motion of the bank. The matter was orally argued to the court and briefs were submitted by both parties.

In support of his petition, the debtor argues that a motion is pending in the state court to have confirmation, order for deed, and the deed of the sheriff, set aside and held for naught. The motion was overruled by the state court and although counsel for the debtor has expressed his intention to perfect his appeal therefrom, it is not considered that either the pendency of such appeal or the pros-[fol. 28] pective action of the state courts is determinative of the question now before this court.

As a second ground, the debtor alleges that his case was dismissed because of the unconstitutionality of Section 75 (s), and for that reason, should be reinstated as a matter of course under the new Subsection (s). The order of dismissal entered by this court affirmatively shows that dismissal was ordered upon three grounds: request of the debtor, failure to reach a composition agreement with his creditors, and the unconstitutionality of the former Subsection (s). However, this contention is not material, since this court has previously held that reinstatement was effective, but that reinstatement in this court, under the circumstances, did not and could not, bring the property to which title had passed within its jurisdiction. The contention of the debtor, while in form complaining of a supposed denial

of reinstatement, which does not exist, is in reality a complaint against the inability of this court to retake into its jurisdiction property which has passed irrevocably from it.

For his third ground, the debtor alleges that his request for dismissal was based upon a misrepresentation made to him by agents or attorneys for the bank, that foreclosure in the state court would proceed unless he had his case in this court dismissed. This ground has been heretofore considered by this court and held not to be well taken. The allegation amounts in fact to a charge of misrepresentation of law. Perhaps it is sufficient to say that the debtor was represented by counsel who approved the order of dismissal, yet in the oral argument, it is asserted that he relied upon advice of attorneys for the bank. If that be true, he was certainly without right to do so, but if he so chose, he cannot now be heard to complain of his choice. Were the court to hold otherwise, it would be a simple matter for a party to place himself in position where he would always be sure of endless recourse by simply claiming that he conferred with attorneys for the opposition and in some measure relied upon their advice rather than that of his own counsel. Many cases have been cited by counsel for the debtor in support of his claim that where one knowing the law, deceives one not knowing the law, relief will be granted. Such cases have no application where one represented by counsel chooses to rely upon the advice of others.

As a fourth ground, the debtor alleges that there was an understanding between his counsel and the bank to the [fol. 29] effect that foreclosure would not be proceeded with, if the case in this court was dismissed. But he further asserts that he learned of the alleged agreement two days after dismissal, August 28, 1935. It is obvious that he did not rely upon that representation when he requested dismissal on August 26. If there was a valid and binding agreement, the debtor has his proper remedy but it does not appear to be an attack upon dismissal at his request nor by complaint here against the subsequent and inevitable misfortunes following it.

The fifth ground urged includes two allegations: first, that the order of disclaimer should have provided for the return of the farm in question to the jurisdiction of this court, in case the deed executed by order of the state court should be set aside by that court. Upon disagree-

ment between counsel, this court entered what is considered to be a proper order and the court is still of that opinion.

The second allegation of the fifth ground is, that the modification of the restraining order granted by my predecessor was contrary to law, and the proceedings of the state court therefore without effect. It is this allegation which it is deemed necessary to consider at some length.

Section 75 (n) provides that the filing of the farmer-debtor's petition or answer shall immediately subject the farmer and all his property to the exclusive jurisdiction of the court. Subsection (o) provides that except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, certain proceedings shall not be instituted, or if theretofore instituted, shall not then be maintained. The proceedings forbidden include proceedings for the foreclosure of a mortgage on land and proceedings to sell land under or in satisfaction of any judgment. It is quite evidently the intent of the law that the status quo shall be maintained until the commissioner has had an opportunity to fully investigate and report his findings to the court.

In the instant case foreclosure had been completed, the decree had issued, and advertising published before the debtor filed his petition herein. The only authority granted by the modified order of this court was for the sheriff to conduct the sale, which amounted to no more than receiving bids, all authority to pass title being expressly withheld. No change was authorized or permitted by this court in the status of the debtor or his property. The following [fol. 30] quotation from the brief of the debtor may be cited as authority:

"24 Ohio Jurisprudence, Judicial Sales, Section 105, page 79. The purchaser obtains no vested right until after the sale is confirmed, and, if the confirmation is refused, the rights of the purchaser fall to the ground. A bid, though the highest, being but an offer to purchase, subject to the approval or disapproval of the court, the accepted bidder whose bid has been returned to the court as the best offer acquires by the mere acceptance of his bid no independent right to have his purchase completed, but is merely a preferred proposer until confirmation of the sale by the court. By acceptance of his bid, and the subsequent confirmation of the same by the court, the bidder becomes the purchaser

in the full sense of the term, and the substantial owner of the property sold, with the right of possession, though his right may not be asserted against the former owner until the due execution of a deed."

Therefore the modification granted by this court did no more than authorize the sheriff to accept bids, while at the same time holding the debtor and his property within the jurisdiction of this court and maintaining the status quo. No injury or prejudice to the debtor resulted; nothing happened to change the relation between the debtor and his property until August 26, 1935, when the debtor by his own act, removed both himself and his property from the jurisdiction of this court. It was the order of dismissal, not the order of modification, which permitted the bank to proceed with its foreclosure sale. This fact is supported by the following quotation from debtor's memorandum filed July 2, 1936:

"The farmer debtor, Byerly, immediately consulted other counsel and for the first time learned that it was his consent to the dismissal in the federal court which permitted the Common Pleas Judge to confirm the sheriff's sale and the sheriff to deliver the deed."

and from his application for reinstatement filed September 24, 1935:

"whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court it was the dismissal thereof which allowed the said sale to be consummated."

[fol. 31]. It is noted also, that the order of modification complained of, was entered November 23, 1934 and no objection was made thereto by the debtor prior to his voluntary dismissal August 26, 1935, a period of approximately nine months within which any valid objection could have been made and acted upon. But the first objection to such modification appearing in the record is found in the debtor's petition for rehearing filed October 26, 1936, nearly two years after the order complained of. Prior to that time, the debtor rested his claims upon the alleged irregularities involved in the dismissal. Even going to the extent of ad-

mitting estoppel, if the dismissal were found to be regular, as evidenced by the following quotation from his memorandum of July 2, 1936:

"If the farmer debtor, knowing what he was doing, had consented to the dismissal of his federal court proceedings and permitted the sheriff's sale to be confirmed and the deed delivered by the sheriff he would be estopped to invoke the provisions of the new Section 75 (s)."

Now by a complete reversal of reasoning, it is here contended that not only is the debtor not estopped by his dismissal which this court has held to be regular, but it is contended that the state court was without jurisdiction because of the order of modification. It must be conceded, however, that the courts of the state of Ohio, do have jurisdiction in foreclosure matters, subject to the paramount bankruptcy jurisdiction of the federal courts. It must be conceded also, that the state court had jurisdiction when it entered its decree in foreclosure before the debtor filed his petition herein, and when, after dismissal in this court, the sale was confirmed and deed ordered. The only part of the proceeding which could possibly be questioned, is the taking of bids by the sheriff at the so-called "sale", and that was done under, and subject to the paramount federal jurisdiction.

It is apparent also, that the bank would have been free to proceed with its completion of the foreclosure sale, after dismissal in this court regardless of whether or not the order of modification had been issued. It may be considered also, that the debtor had exhausted his remedy under all subdivisions of the act to Subsection (s), and if neither the order of dismissal nor the order of modification had been entered, the case could have been dismissed upon motion of any interested party after Subsection (s) had been declared unconstitutional, resulting also in completion of the foreclosure sale.

[fol. 32] The case of Hoyd v. The Citizens Bank of Albany Company decided by the United States Circuit Court of Appeals, Sixth Circuit, March 12, 1937, is cited by the debtor as controlling herein, but that case is clearly distinguishable from the one under consideration. In the Hoyd case, an injunction had been issued by the court after sale and before confirmation. Then the court, without hearing

or report of the conciliation commissioner dissolved the injunction, permitting confirmation; the final and specific act by the state court which terminated the rights of the debtor in his property and rendered all further efforts under Section 75 in the Federal Court useless and impotent. The sole question in that case was whether or not the federal court could permit the final act; confirmation, by dissolving its injunction before hearing and report of the commissioner.

In the instant case, the court did not dissolve its injunction; it did not permit the relation of the debtor to his property to be disturbed; it permitted no sale, in any true sense of the word; nor did the court surrender jurisdiction over either the property or the debtor. In the Hoyd case, the act which permitted confirmation; cut off the debtor's rights, and left him without recourse, was the act of the court in dissolving its injunction. In the instant case, the act which removed the property of the debtor from the jurisdiction of this court; permitted confirmation, and brought injury to the debtor, was his own act requesting dismissal. No voluntary dismissal was involved in the Hoyd case.

The question of sale was not before the Circuit Court of Appeals in the Hoyd case except insofar as sale meant confirmation and the actual passage of title. Sale in the sense in which it took place in the Byerly case, being the formal acceptance and offer of bids, preceded the filing of Hoyd's petition under 75 and could not have been contemplation of the upper court in that case.

After careful consideration, this court finds that said debtor's petition for a rehearing ought to be, and the same hereby is, denied.

Entry accordingly.

Mell G. Underwood, U. S. District Judge.

[fol. 33] In United States District Court

Motion that Case be Referred to Conciliation Commissioner—Filed April 17, 1937

1. Now comes the said farmer debtor bankrupt, Carl Byerly, and respectfully moves that the proceedings herein

be referred to a conciliation commissioner pursuant to Subsection (s) of Section 75 of the Bankruptcy Act.

2. Said Carl Byerly respectfully moves the court to refer to the conciliation commissioner for proper proceedings pursuant to Subsection (s) of Section 75 of the Bankruptcy Act, his property described in his schedule which accompanied his petition filed herein on November 19, 1934, having particular reference to the real estate referred to and set forth in Schedule B of said petition, which real estate is more particularly described as follows:

(A description of the real estate is printed as a part of the petition at page 2.)

Carl Byerly, by Elmer McClain, His Attorney.

[Duly verified.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed May 1, 1937

The motion of the farmer-debtor to refer this case to a conciliation commissioner is overruled for the following reasons:

(1) On October 22, 1936, this court entered an order of disclaimer with respect to the property described in the schedules accompanying the petition of this farmer-debtor and, therefore, there is no real estate over which this court has jurisdiction.

(2) The farmer-debtor has failed to comply with Rule 12, Paragraph 3 of the rules of this court relative to filing a brief statement of the grounds upon which a motion is based, together with citations of authorities.

[fol. 34] It does not appear that a copy of this motion was served upon opposing counsel and the court is advised that no copy was so served.

An entry may be prepared accordingly.

Mell G. Underwood, Judge, U. S. D. C.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING PETITION FOR REHEARING—Filed May 6, 1937

This day this matter came on to be heard upon the petition for rehearing of the order of disclaimer, heretofore entered by the court October 22, 1936, which petition was filed by farmer debtor bankrupt, Carl Byerly, and said petition for rehearing was heard upon oral arguments and briefs of counsel. The court, upon consideration thereof and being fully advised in the premises finds that said petition for rehearing is not well taken and the same is hereby overruled and denied.

To which finding and order of the court, the bankrupt, Carl Byerly, excepts.

Mell G. Underwood, United States District Judge.

[fol. 34a] IN UNITED STATES DISTRICT COURT

Omission from Motion that Case be Refered to Conciliation Commissioner

STATEMENT OF GROUNDS OF MOTION

On the nineteenth day of November, 1934, when the original petition of Carl Byerly, the farmer debtor bankrupt herein, was filed, he had a property right in the real estate described in the petition and in this motion, which property right has remained in him at all times from said date to the present moment.

On November 23, 1934, an order issued from this court purporting to order: "That the restraining order entered herein under date of November 19, 1934, be and the same is hereby modified to permit the Union Joint Stock Land Bank of Detroit and the sheriff of Madison county, Ohio, to proceed to and conduct the sale of said premises in the proceedings now pending before the Madison county Common Pleas Court." Such order was issued from this court without a petition having been made to and granted by the judge thereof after hearing and report by the conciliation commissioner, as prescribed by law, and was, therefore, void, and of no effect.

CITATIONS OF AUTHORITIES RELIED UPON

Decision of the United States Circuit Court of Appeals for the Sixth Circuit in Case No. 7112, Andrew Hoyd, Bankrupt, Appellant, v. The Citizens Bank of Albany, Appellee, decided March 12, 1937.

Section 75 of the Bankruptcy Act, Subsections (n) and (o).

A copy of this motion was left with Ralph G. Martin, attorney for the Union Joint Stock Land Bank of Detroit, at his office with a clerk thereof on May 7, 1937, prior to the filing of this motion.

Elmer McClain, Attorney for Carl Byerly.

[Vol. 35] IN UNITED STATES DISTRICT COURT

MOTION THAT CASE BE REFERRED TO CONCILIATION COMMISSIONER—Filed May 7, 1937

1. Now comes the said farmer debtor bankrupt, Carl Byerly, and respectfully moves that the proceedings herein be referred to a conciliation commissioner pursuant to Subsection (s) of Section 75 of the Bankruptcy Act.

2. Said Carl Byerly respectfully moves the court to refer to the conciliation commissioner for proper proceedings pursuant to Subsection (s) of Section 75 of the Bankruptcy Act, his property described in his schedules which accompanied his petition filed herein on November 19, 1934, having particular reference to the real estate referred to and set forth in Schedule B of said petition, which real estate is more particularly described as follows:

(A description of the real estate is printed as a part of the petition at page 2.)

Carl Byerly. By Elmer McClain, His Attorney.

[Duly verified.]

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING MOTION TO REFER TO CONCILIATION COMMISSIONER—Filed May 8, 1937

This day this matter came on to be heard upon the motion of the farmer debtor to refer this case to a conciliation

commissioner and the court being fully advised in the premises finds that said motion is not well taken for the following reasons:

(1) On October 22, 1936, this court entered an order of disclaimer with respect to the property described in the schedules accompanying the petition of this farmer-debtor and, therefore, there is no real estate over which this court has jurisdiction.

(2) The farmer-debtor has failed to comply with Rule 12, Paragraph 3 of the rules of this court to filing a brief statement of the grounds upon which a motion is based, together with citations of authorities.

[fol. 36] It does not appear that a copy of this motion was served upon opposing counsel and the court is advised that no copy was so served.

It is therefore ordered that said motion be and the same is hereby overruled.

To all of which finding and order of the court, the farmer-debtor excepts.

Mell G. Underwood, United States District Judge.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING MOTION TO REFER TO CONCILIATION COMMISSIONER—Filed May 27, 1937

This day this matter came on to be heard upon the motion of the farmer-debtor that the cause be referred to a conciliation commissioner, which motion was filed May 7, 1937, and the court being fully advised in the premises finds that said motion is identical with the motion heretofor- filed and overruled on May 8, 1937. Said motion is therefore not well taken and is hereby overruled.

To all of which findings and order of the court, the farmer-debtor excepts.

Mell G. Underwood, United States District Judge.

[fol. 37] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL UNDER SECTION 24 (A) OF THE BANKRUPTCY ACT—Filed May 27, 1937

To the Honorable Mell G. Underwood, Judge of the United States District Court for the Southern District of Ohio:

Your petitioner, the above-named Carl Byerly, does hereby petition for an appeal to the United States Circuit Court of Appeals for the Sixth Circuit because he conceives himself to be aggrieved by the certain orders entered respectively in this court, to wit: the order entered on October 22, 1936, ordering, adjudging and decreeing that all of the right, title and interest of the said Carl Byerly, your petitioner, in and to the real estate described therein was thereby disclaimed in favor of the said Union Joint Stock Land Bank of Detroit, named as appellant herein; the order entered on May 6, 1937, denying his petition for rehearing of the said order entered October 22, 1936, disclaiming the said real estate; the order entered on May 8, 1937, denying his motion, filed on April 17, 1937, to refer to a conciliation commissioner his proceedings pending herein, having particular reference to the said real estate; the order entered on May 27, 1937, denying his motion filed on May 7, 1937, to refer to a conciliation commissioner his proceedings herein, and particularly his said real estate. With this petition your petitioner presents his assignment of errors.

Your petitioner further prays that his appeal may be allowed and that a citation may be granted, directed to the said Union Joint Stock Land Bank of Detroit, commanding it to appear before the United States Circuit Court of Appeals for the Sixth Circuit to do and to receive that which may appertain to justice to be done in the premises and that a transcript of the record, papers, and evidence in said proceedings duly authenticated may be transmitted to the said United States Circuit Court of Appeals for the Sixth Circuit.

Your petitioner further prays that an order be made fixing the amount of security to be given in a bond to be filed herein, conditioned pursuant to law, and says that said Union Joint Stock Land Bank of Detroit is now and ever since about November 1, 1936, has been in possession of said real estate against the will of the petitioner herein under a

temporary restraining order issued against him by the Common Pleas Court of Madison county, Ohio, upon the [fol. 38] application of said Union Joint Stock Land Bank of Detroit.

Carl Byerly. By Elmer McClain, Lima, Ohio, His Counsel.

[Duly verified.]

Appeal allowed and bond fixed in the amount of $250.00 on May 27, 1937.

Mell G. Underwood, Judge of the United States District Court for the Southern District of Ohio.

In United States District Court

Order Allowing Appeal—Filed June 7, 1937

The petition of Carl Byerly filed June 3, 1937, for leave to appeal from an order of the District Court of the United States for the Southern District of Ohio is hereby granted and the appeal is allowed. Citation to be issued returnable thirty days from this date.

Approved for entry:

(Signed) Xen Hicks, Circuit Judge.

[fol. 39] In United States District Court

Assignment of Errors—Filed May 27, 1937.

Carl Byerly, the above-named appellant, in connection with his petition for appeal filed herewith makes and files this assignment of errors, which he avers occurred in the proceedings had in the above-entitled cause and on which he will rely in his appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the final orders and judgments of the United States District Court for the Southern District of Ohio, Eastern Division, at Columbus, entered respectively on October 22, 1936; May 8, 1937; and May 27, 1937.

The District Court erred:

1. In ordering, by its order entered on October 22, 1936, that all of the interest of Carl Byerly, the appellant herein,

be disclaimed in favor of the Union Joint Stock Land Bank of Detroit, the appellee.

2. In finding and holding that the restraining order entered on November 19, 1934, was modified so as to permit said Union Joint Stock Land Bank of Detroit, the appellee, and the sheriff of Madison county, Ohio, to proceed with the sale of said real estate.

3. In finding and holding that the said Union Joint Stock Land Bank of Detroit became the purchaser of said real estate.

4. In finding and holding that following the decision of the United States Supreme Court in Louisville, etc., v. Radford, the said Carl Byerly applied to the said District Court to have his proceedings dismissed.

5. In finding and holding that any valid deed of said real estate was executed and delivered by the sheriff of Madison county, Ohio.

6. In finding and holding that no proceeding relating to said real estate was pending in said District Court on September 10, 1935, when said purported sheriff's sale was confirmed.

7. In finding and holding that said District Court was entirely without jurisdiction over said real estate on September 16, 1935, when said purported sheriff's sale was confirmed.

8. In finding and holding that the reinstatement of the said proceedings in said District Court on September 24, 1935, did not give said District Court further jurisdiction over said real estate.

9. In finding and holding that said cause passed from the jurisdiction of said District Court with the entry of dismissal on August 26, 1935.

10. In finding and holding that a good title was conveyed to the Union Joint Stock Land Bank of Detroit, appellant [fol. 40] herein, by the sheriff of Madison county, Ohio.

11. By its order entered May 6, 1937, overruling and denying the petition for rehearing filed by the petitioner, Carl Byerly, on October 26, 1936.

12. By its order entered on May 8, 1937, overruling the motion of the petitioner, Carl Byerly, filed April 17, 1937, to refer his case to a conciliation commissioner.

13. By finding and holding that by its order entered on October 22, 1936, there was no real estate over which said District Court had jurisdiction.

14. By its order entered on May 27, 1937, overruling the motion of the petitioner, Carl Byerly, filed May 7, 1937, to refer his case to a conciliation commissioner.

Wherefore the said appellant prays that the said orders may be reversed and for such other and further relief as the court may grant.

Elmer McClain, Counsel for Carl Byerly, Appellant.

Bond on appeal for $250.00 approved and filed June 7, 1937, omitted in printing.

[fol. 41] Citation, in usual form, showing service on Ralph G. Martin filed May 27, 1937, omitted in printing.

[fol. 42] In United States District Court

Entry Extending Time etc.—Filed June 30, 1937

It is ordered that a motion of appellant to dispense with printing of record and briefs be and the same is denied.

It is further ordered, on motion of appellant, that the time for filing transcript of record be and the same is extended to September 1, 1937.

Approved for entry:

(Signed) Xen Hicks, Circuit Judge.

[fol. 43] In United States District Court

Pr-ecipe for Transcript of Record—Filed August 13, 1937

To the clerk of said court:

Please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Sixth

Circuit, pursuant to the appeal herein allowed by this court and by said Court of Appeals and include therein the following papers, namely:

1. Petition of farmer-debtor filed pursuant to Section 75, Subsections (a) to (r) together with the schedules therewith.

2. Order approving said petition and the order of reference thereon.

3. Application for restraining order.

4. Order restraining foreclosure proceedings in state court.

5. Order modifying restraining order.

6. Report of conciliation commissioner.

7. Amended petition pursuant to Subsection (s) of Section 75 as enacted June 28, 1934.

8. Order of adjudication and reference thereon.

9. Order of dismissal entered August 26, 1935.

10. Application for reinstatement.

11. Order of reinstatement.

12. Motion of Union Joint Stock Land Bank to dismiss reinstatement.

13. Motion of Union Joint Stock Land Bank for order of disclaimer [omit description of real estate and substitute the following: (The property described is that set forth in Schedule B which accompanied the petition)].

14. Entry finding Subsection (s) enacted August 28, 1935, Constitutional.

15. Opinion of Judge Underwood filed October 14, 1936, on motion for an order of disclaimer.

16. Order of disclaimer, entered October 22, 1936.

17. Petition for rehearing, filed on October 26, 1936, on order of disclaimer.

18. Certified copy of order of Judge Bell of Madison county, Ohio, Common Pleas Court, overruling motion to vacate confirmation of sheriff sale.

19. Opinion of Judge Underwood filed April 4, 1937, on petition for rehearing.

20. Motion of debtor filed April 17, 1937, to refer proceedings to conciliation commissioner. [Omit description of real estate and substitute: (The real estate described is the same as that set forth in Schedule B which accompanied the petition)].

[fol. 44] 21. Opinion of Judge Underwood filed May 1, 1937, on motion to refer to conciliation commissioner.

22. Order entered May 6, 1937, overruling motion to refer proceedings.

23. Motion of debtor filed May 7, 1937, to refer proceedings to conciliation commissioner [Omit description of real estate and substitute: (The real estate described is that set forth in Schedule B which accompanied the petition)].

24. Order entered May 8, 1937, overruling motion to refer proceedings.

25. Order entered May 27, 1937, overruling motion to refer proceedings.

26. Petition for appeal.

27. Order allowing appeal.

28. Assignment of errors.

29. Appeal bond.

30. Citation.

31. This pr-ecipe.

32. Clerk's certificate.

Said transcript to be prepared and filed in the appellate court on or before September 1, 1937.

Elmer McClain, Counsel for Carl Byerly, Appellant.

Acknowledged and approved.

Ralph G. Martin, Counsel for Union Joint-Stock Land Bank of Detroit, Appellee.

STIPULATION CONCERNING CERTIFICATE OF RECORD

It is hereby stipulated and agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the appellate court, as a truthful and complete copy of the original papers used in these proceedings as set forth in the pr-ecipe for transcript, without further comparison by the clerk.

Elmer McClain, Counsel for Appellant. Ralph G. Martin, Counsel for Appellee.

[fols. 45-46] Clerk's certificate omitted in printing.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

(April 13th, 1939—Before: Hicks, Allen and Hamilton, JJ.)

This cause is argued by Elmer McClain for Appellant and by Ralph G. Martin for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered September 18, 1939

Appeal from the District Court of the United States for the Southern District of Ohio

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded for further proceedings consistent with the opinion of this court.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed September 18, 1939

Before Hicks, Allen and Hamilton, Circuit Judges

HICKS, Circuit Judge:

Appeal from three orders in the matter of Carl Byerly, Farmer Debtor, Bankrupt, under Sec. 75(s) of the Bankruptcy Act as amended by Act of August 28, 1935 (U. S. C. Title 11, Section 203).

The first order, entered October 22, 1936, adjudged that all right, title and interest of appellant Byerly in certain real estate (his farm) be disclaimed in favor of appellee, Union Joint Stock Land Bank. The second, entered May

8, 1937, denied appellant's motion for a rehearing upon the first; and the third, entered May 27, 1937, denied appellant's motion to refer the proceedings to a conciliation commissioner. The issue is, whether appellant had a property right in the farm when the court entered the order of disclaimer, or whether such right had been previously divested, during the pendency of his farmer debtor petition, by sheriff's foreclosure sale prior to reference to a conciliation commissioner, with confirmation after such reference.

Since 1924 the Bank, or its assignor, had held a mortgage upon the farm. Appellant became delinquent and on October 19, 1933, the Bank brought foreclosure proceedings in a Court of Common Pleas. On April 26, 1934, a decree of foreclosure and an order of sale were entered. The sale was fixed for November 24, 1934.

On November 19 appellant filed his petition under Sec. 75 of the Bankruptcy Act (Title 11 U. S. C. Sec. 203) for a composition or extension of time within which to pay his debts and receive the benefits of the Frazier-Lemke Act [Act of June 28, 1934, 11 U. S. C. Par. 203(s)] and obtained an order restraining the sale. However, on oral application of the Bank, the court, on November 23, modified the restraining order to permit the sheriff to proceed with the sale; but ordered "that any proceedings or acts subsequent to the sale of said premises, particularly confirmation thereof, or the transfer of any title or deed thereunder be and the same are hereby enjoined and stayed until the further order of this court, in accordance wtih the order of November 19, 1934, except as the same is herein modified. * * *"

[fol. 49] On December 14, 1934, the court approved appellant's petition and referred the matter to a conciliation commissioner who held meetings on January 8 and 24 of 1935. The Bank was the only creditor present and at the second meeting rejected an offer of composition made by appellant. Whereupon on February 11 the Commissioner reported that appellant had failed to obtain the acceptance of a majority in number and amount of all creditors whose claims were filed and allowed.

On the same date appellant amended his petition and asked to be adjudged a bankrupt under Sec. 75(s) of the Bankruptcy Act. Adjudication immediately followed and the matter was referred to a referee.

On May 27, 1935, the Supreme Court declared Sec. 75(s) unconstitutional (Louisville Joint Stock Land Bank v. Radford, 293 U. S. 555) and on August 26 thereafter, upon application of appellant, his petition and amended petition were dismissed because Sec. 75(s) had been found by the Supreme Court to be unconstitutional.

On September 10 the Bank, which had been the purchaser at the foreclosure, applied to and obtained from the State court a confirmation of the sale. The sheriff's deed issued and was recorded the next day. Meanwhile, on August 28, 1935, Congress amended Sec. 75(s), subsection (5) thereof, providing that "all cases that have been dismissed by any * * * court because of the Supreme Court decision, holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges, * * *" The constitutional validity of this amendment was upheld in Wright v. Vinton Branch Mountain Trust Bank, 300 U. S. 440.

Pursuant to this amendment, appellant on September 24, 1935, applied for reinstatement, rehearsing the above facts, and alleging that he had petitioned for the dismissal entered August 26, 1935, because the Bank had represented that unless he dismissed the proceedings it would foreclose; that, relying thereon and believing that this was the only way foreclosure could be prevented, he consented to the dismissal; that the Bank, contrary to its representations, proceeded to obtain confirmation of the sale to it, accepting the [fol. 50] delivery of the deed and recording same; and that it was not until he consulted other counsel that he realized he had paved the way for the confirmation of the sale by the order of dismissal. Appellant concluded his application with the prayer that the Bank be restrained, "from in any manner disposing of, deeding, mortgaging, encumbering" (the farm) "or contracting to do so, until further order of this court."

The proceeding was reinstated on September 24, 1935, and on May 8, 1936, the Bank moved for an order of disclaimer, alleging that appellant's application for reinstatement was filed after the confirmation of the foreclosure sale on September 10, and the execution and recordation of the deed on the following date. The court issued the order of disclaimer. It held that when the sale of the farm was confirmed by the Court of Common Pleas no proceeding was pending in the bankruptcy court and that the court was

therefore without jurisdiction over the farm; that the reinstatement did not give the court further jurisdiction over it and that jurisdiction had passed with the entry of dismissal on August 26, 1935.

Appellant contends that he had an interest in the farm at the time his case was reinstated because the court was unauthorized under subsections (n) and (o)(2) and (6) of Sec. 75 to modify its restraining order of June 28, 1934, to permit the sheriff to make the sale for the reason, that the conciliation commissioner had not then conducted a hearing or filed a report. Pertinent portions of these subsections follow:

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property * * * to the exclusive jurisdiction of the court. * * *"

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the [fol. 51] confirmation or other disposition of the composition or extension proposal by the court. * * *

"(2) Proceedings for foreclosure of a mortgage on land; * * *

"(6) Seizure, distress, sale, or other proceedings under an execution or under any * * * mortgage." [11 U. S. C. Sec. 203 (n) and (o)].

We think that the order modifying the original restraining order to permit the sheriff to proceed with the sale was void. It was made prior to the appointment of a conciliation commissioner and of course prior to any hearing and report by him. The sheriff's sale was an essential step in the proceeding for foreclosure, and the court was not only unauthorized to allow it but its allowance was expressly prohibited by subsection (o) of Sec. 75. The order lay without the scope of the court's jurisdiction.

The order to one side, the sale by the sheriff was void because it was likewise prohibited by subsections (2) and (6) of Section (o). See Hoyd v. Citizens Bank of Albany

Co., 89 Fed. (2d) 105 (C. C. A. 6). The facts in that case differ somewhat from those presented here but the sections of the statute there construed, namely, subsections (n); (o)(2) and (6) of Sec. 75 are the same; In the Hoyd case, we said that the application of subsection (o) was "mandatory." In commenting upon the confirmation of the sale subsequently to the vacation of the restraining order, this court in that case said:

"• • • in any event under the mandatory provisions of subsection (o) all proceedings in the foreclosure action, including sale, were stayed after the filing of the debtor's petition, *and were of no* effect." (Italics ours.)

The appellant and his farm were in the exclusive jurisdiction of the bankruptcy court from the filing of his petition on November 19, 1934, [subsection (n) above quoted; Hoyd v. Citizens Bank, supra, p. 107], until the petition and amended petition were dismissed on August 26, 1935.

We think that the Bank's deed was also void. It was based upon the confirmation of the sale not only unauthor-[fol. 52] ized but specifically prohibited [subsection (o)]. Confirmation was essential to the validity of the Bank's title (Hoyd v. Citizens Bank, supra, p. 108) but there can be no valid confirmation of a void sale. In Mitchell v. St. Maxent's Lessee, 71 U. S. 237, 242, the court said:

"Void process confers no right on the officer to sell, and all acts done under it are absolute nullities."

In Shriver's Lessee v. Lynn, 43 U. S. 43, 59, it was said:

"The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court,—nothing on which its judgment could rest."

In Thatcher v. Powell, 19 U. S. 54, 56, it was said:

"That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; • • •"

It is urged that the decree of confirmation, unappealed from, is valid as against collateral attack, but this rule has no application. We are dealing with something more than a mere error in the judgment of the state court. If that were all, the decree of confirmation would be binding. We are confronted with the lack of the court's power to confirm the sale. The power being absent, the confirmation was a nullity and may be declared such, collaterally. Voorhees v. United States Bank, 35 U. S. 298, 316; Thompson v. Tolmie, 27 U. S. 97, 99. The confirmation being void for want of authority to make it, barred nobody, bound nobody and justified no action thereunder. It is elemental that the question of the jurisdiction of the state court, i. e., its power to act, may be inquired into here. Elliott v. Peirsol, 26 U. S. 248; Hickey v. Stewart, 44 U. S. 750, 761.

[fol. 53] We think that appellant has never been divested of his property rights in the farm and that the bankruptcy court had exclusive jurisdiction [subsection (n)] at the time the order of disclaimer was entered. The order is therefore set aside and the case remanded for further proceedings consistent herewith.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] Supreme Court of the United States

Order Allowing Certiorari—Filed January 29, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,986. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 579. Union Joint Stock Land Bank of Detroit, Petitioner, vs. Carl Byerly. Petition for a writ of certiorari and exhibit thereto. Filed December 9, 1939. Term No. 579, O. T., 1939.